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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**RICHARD P. BRINKERHOFF,**

**Petitioner,**

**vs.**

**SCHWAN'S BAKERY OPERATIONS  
LLC and AMERICAN PROTECTION  
INSURANCE CO.,**

**Respondents,**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 06-0469**

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Schwan's Bakery Operations LLC and its insurance carrier, American Protection Insurance Co. (referred to jointly as "Schwan's" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Trayner's award of benefits to Richard P. Brinkerhoff under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

Mr. Brinkerhoff injured his right foot in a work accident at Schwan's on March 1, 1998. In this proceeding, Mr. Brinkerhoff claims that his right foot injury ultimately resulted in his need for left knee replacement surgery, and that Schwan's is liable under the Utah Workers' Compensation Act for the expense of his knee surgery.

Judge Trayner held an evidentiary hearing on Mr. Brinkerhoff's claim and then ordered Schwan's to pay for the knee surgery, as well as travel expense and attorney's fees. Schwan's motion for review of Judge Trayner's decision argues that Judge Trayner should have appointed a medical panel to evaluate Mr. Brinkerhoff's claim. Alternatively, Schwan's argues it is liable to pay only a portion of the expense of Mr. Brinkerhoff's knee surgery.

**FINDINGS OF FACT**

The Appeals Board finds the following facts to be material to the issues raised by Schwan's motion for review. The Appeals Board also adopts Judge Trayner's findings of fact to the extent they are consistent herewith.

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In 1970, Mr. Brinkerhoff injured his right ankle in a non-work accident. At that time, the ankle was fused and Mr. Brinkerhoff recovered to the extent that he was able to play basketball and engage in other ordinary activities.

On March 1, 1998, while working for Schwan's, Mr. Brinkerhoff fell from an 8-foot ladder. As he fell, his left knee hit the edge of a table and he landed on his right ankle. Mr. Brinkerhoff experienced chronic pain in his right foot after this accident. Then, over time, he also developed pain in his left knee.

On January 17, 2001, Dr. Howe fused the subtalar joint of Mr. Brinkerhoff's right foot. Although Mr. Brinkerhoff returned to work at Schwan's, his convalescence extended for more than a year. He reached medical stability with respect to the right foot injury and surgery on March 5, 2002, but continued to suffer sores and pain in his right foot, and increasing pain in his left knee.

On March 22, 2005, Dr. Howe opined that Mr. Brinkerhoff's work-related right ankle fusion had stressed his left knee, resulting in the need for left knee replacement surgery. Dr. Howe reaffirmed this opinion on May 2, 2006.

Dr. Knorpp, Schwan's medical consultant, examined Mr. Brinkerhoff twice, on December 27, 2004, and September 27, 2006. Dr. Knorpp concluded that "no more than" 25% of Mr. Brinkerhoff's left knee symptoms were attributable to the work accident at Schwan's. Dr. Knorpp agreed with Dr. Howe that Mr. Brinkerhoff required left knee replacement surgery, but not for reasons "predominantly or primarily" attributable to the work accident.

**DISCUSSION AND CONCLUSIONS OF LAW**

Section 34A-2-418 of the Utah Workers' Compensation Act requires employers and their insurance carriers to pay "reasonable sums for medical . . . services . . . necessary to treat injured employees." Schwan's concedes it is liable under the Act for medical care necessary to treat the injuries caused by Mr. Brinkerhoff's work accident on March 1, 1998. The only question before the Appeals Board is whether Mr. Brinkerhoff's need for left-knee replacement surgery is also attributable to the March 1, 1998, work accident. Schwan's argues that the Commission should appoint an impartial medical panel to resolve the difference of opinion that exists on this question between the parties' own medical experts.

Section 34A-2-601 permits the Commission to utilize impartial medical panels in evaluating disputed workers' compensation claims. The Commission's Rule R602-2-2 provides that "[a] panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports." Thus, Rule R602-2-2 establishes two threshold requirements for appointment of a medical panel. There must be 1) conflicting medical reports that 2) involving a significant medical issue.

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In this case, Dr. Howe opines that Mr. Brinkerhoff's work accident injured his right ankle, which in turn stressed his left knee and necessitated replacement surgery. On the other hand, Dr. Knorpp states that only 25% of Mr. Brinkerhoff's need for replacement surgery is attributable to his work accident. Thus, Dr. Howe and Dr. Knorpp's opinions are "conflicting medical reports" so as to satisfy Rule R602-2-2's first requirement for appointment of a medical panel. However, as discussed below, these two opinions do not involve a "significant" medical issue and do not satisfy the rule's second precondition for appointment of a medical panel.

In arguing that the dispute between Dr. Howe and Dr. Knorpp involves a "significant" medical issue, Schwan's contends that "if there are multiple causes from a general wearing out of the left knee . . . then [Schwan's] should only be responsible for the portion that is attributable to their industrial injury." To support this proposition, Schwan's relies on the apportionment provision found in §34A-3-105 of the Utah Occupational Disease Act. However, §34A-3-105's plain language limits its application to compensation "payable under this chapter [the Utah Occupational Disease Act] for an occupational disease . . . ." In light of this plain language, the cited provision of the Utah Occupational Disease Act cannot be applied to Mr. Brinkerhoff's workers' compensation claim.<sup>1</sup>

Schwan's argument is also contrary to fundamental principles of the workers' compensation system. As stated in *Larson's Workers' Compensation Law*, § 9.02 "Internal Weakness Aggravated by Employment" (emphasis added):

Preexisting disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment **aggravated, accelerated, or combined with** the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that **the employer takes the employee as it finds that employee.**

In summary, while Dr. Howe and Dr. Knorpp do not agree on the degree by which Mr. Brinkerhoff's work injury contributed to his need for knee replacement surgery, the doctors agree that the work injury "aggravated, accelerated, or combined with" Mr. Brinkerhoff's preexisting problems to necessitate the surgery. Consequently, Schwan's is liable for workers' compensation benefits attributable to the surgery, and the differences of opinion between Dr. Howe and Dr. Knorpp is not material to that liability.

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1 The Appeals Board notes Schwan's assertion that failure to apply §34A-3-105 of the Occupational Disease Act to Mr. Brinkerhoff's workers' compensation claim would violate Schwan's constitutional rights to equal protection. The Appeals Board lacks jurisdiction to consider such constitutional issues. Furthermore, the Appeals Board does not necessarily agree with Schwan's underlying interpretation of the effect of §34A-3-105 in those occupational disease claims to which it legitimately applies.

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**ORDER**

The Appeals Board affirms Judge Trayner's decision. It is so ordered.

Dated this 31<sup>st</sup> day of May, 2007.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch